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(3)

No. 07-73

In the Supreme Court of the United States

ISAAC DAYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the jury instructions given at petitioner's trial impermissibly departed from the terms of a "to wit" clause in the indictment so as either to effect a constructive amendment of the indictment or to result in a prejudicial variance.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A7) is reported at 476 F.3d 111. An additional opinion of the court of appeals (Pet. App. B1-B13) is not published in the *Federal Reporter* but is reprinted in 216 Fed. Appx. 84.

JURISDICTION

The judgment of the court of appeals was originally entered on February 5, 2007. A corrected judgment was entered on March 8, 2007. A petition for rehearing was denied on April 19, 2007 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on July 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit bank fraud, in violation of 18 U.S.C. 371; bank fraud in connection with a check-kiting scheme, in violation of 18 U.S.C. 1344; and bank fraud in connection with fraudulently obtaining a bank loan, in violation of 18 U.S.C. 1344. He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release, and ordered to pay $1.1 million in restitution. The court of appeals affirmed petitioner's convictions, but vacated the restitution order and remanded for further proceedings. Pet. App. A1-A7, B1-B13.

1. Between December 1999 and March 2001, petitioner, a wholesale diamond dealer in New York City, was involved in a check-kiting scheme with other diamond dealers. Throughout that period, petitioner and other diamond dealers exchanged checks worth millions of dollars. Ostensibly, the checks were payments for purchases and sales of diamonds, but no diamonds actually changed hands. When the checks were exchanged, petitioner and another diamond dealer would deposit the checks on the same day so that the respective checks would not bounce. Petitioner and the other dealers would often pre-date the checks to disguise the scheme from the banks. They would also issue different numbers of checks to each other and take other steps to create the appearance of actual diamond transactions. In all, tens of millions of dollars were exchanged with no assets backing up the checks. In February and March 2001, some of the checks failed to clear, and the scheme collapsed, leaving petitioner's accounts overdrawn by approximately $75,000. Pet. App. A2-A3.

While the scheme was ongoing, petitioner used the falsely inflated bank balances to support fabricated sales figures that he included in loan applications to various banks. Through his company, Fortune Diamond Importers, petitioner applied for a $100,000 loan from Chase Manhattan Bank; a $75,000 loan from North Fork Bank; and a $100,000 loan from Fleet National Bank. Chase Manhattan Bank granted petitioner a $75,000 line of credit, and North Fork Bank and Fleet National Bank each granted petitioner's loan request in full. In the Fleet loan application, petitioner asserted that he had $8,660,505 in sales for 1999—a figure based on general ledgers and financial statements that petitioner's accountant derived from the firm's bank account statements, counting each check accepted from the co-conspirators as a diamond sale; in fact, petitioner's tax returns showed much more modest sales. In addition, in response to the question on the Fleet loan application "[d]o you or does your business owe any taxes for years prior to the current year," petitioner answered "[n]o." Pet. App. A3, B3; C.A. App. 626.

2. A federal grand jury returned a four-count indictment against petitioner and two co-defendants. Count 1 charged him with conspiracy to commit bank fraud, in violation of 18 U.S.C. 371. Count 2 charged him with bank fraud based on the check-kiting scheme, in violation of 18 U.S.C. 1344. Count 3 charged him with bank fraud based on the fraudulent loan from North Fork Bank, in violation of 18 U.S.C. 1344. Count 4 charged him with bank fraud based on the fraudulent loan from Fleet National Bank, in violation of 18 U.S.C. 1344. As relevant here, Count 4 alleged that petitioner executed a scheme or artifice to defraud Fleet National Bank

> by means of false and fraudulent pretenses, representations, and promises, to wit, [petitioner] submitted to Fleet National Bank a small business credit application seeking a line of credit in the amount of approximately $100,000 on behalf of his business, Fortune Diamond Importers, that falsely and fraudulently reported sales of approximately $8,660,505 for the year 1999.

Indictment 8.[1] Petitioner's co-defendants pleaded guilty to various counts of the same indictment; petitioner elected to stand trial. Pet. App. A4.

3. At trial, the government devoted "substantial time and testimony" to establishing, with respect to Count 4, that petitioner defrauded Fleet by falsifying his sales figures on his loan application. Pet. App. B5. On cross-examination, the government elicited an admission from petitioner that he had misrepresented in the same application that he did not owe any back taxes. *Ibid.*; 12/20/04 Tr. 1008. Although the government, in its closing argument, told the jury that it would "go through some of the evidence showing beyond a reasonable doubt that [petitioner] submitted applications with all sorts of false financial information on them to get those loans," *id.* at 1049, the government's review of the specific evidence presented to support Counts 3 and 4 (the fraudulent loan charges) emphasized the falsity of the sales figures and did not call the jury's attention to other statements made in the applications, such as the statement that petitioner owed no back taxes. See *id.* at 1074-1078. At no time during the summation or rebuttal

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[1] The indictment used a similar "to wit" clause in Count 3 with regard to the North Fork Bank loan that alleged fraudulent 1998 sales of approximately $5 million. Indictment 7.

did the government direct the jury to information other than the false sales figures as the bases for conviction on those two counts. See *id.* at 1118 (reviewing the evidence showing inflated sales figures).

Before instructing the jury on the law, the district court provided the parties with its proposed jury instructions. Those instructions contained, among other things, a paragraph summarizing the three substantive bank fraud counts (Counts 2, 3 and 4), including a statement that the loan aspect of the scheme to defraud focused on petitioner's "applying for two lines of credit using false and fraudulent information in support of those applications." C.A. App. 204 (alterations omitted). During the December 17, 2004, charging conference, the government, consistent with Second Circuit precedent, maintained that the false statements mentioned in the "to wit" clauses in Counts 3 and 4 did not "limit[]" the government by preventing it from relying on other false statements in the respective loan applications to support a conviction. *Id.* at 171. Petitioner objected that, without such a limitation, the government would be able to convict petitioner on a theory not charged in the indictment. The next day, petitioner submitted a letter requesting that the instruction be revised to read, "by applying for two lines of credit using false information *about his business' sales* in support of those applications." *Id.* at 204 (as altered) (emphasis added). Petitioner did not otherwise object to the instruction on the elements of bank fraud. The government responded in writing, asserting that "the Court should not limit its instruction about the fraudulent information in [petitioner's] line of credit application to the false statements about [petitioner's] business' sales" because "[t]he applications also contain false information about [peti-

tioner's] salary as well as other matters, and are fraudulent for those reasons as well." *Id.* at 208.

In its final charge, the district court began by summarizing Counts 3 and 4, noting, "Counts Three and Four also charge bank fraud. * * * Count Four charges that, in or about October 2000, [petitioner] submitted to Fleet National an application seeking a line of credit in the amount of $100,000 on behalf of Fortune Diamond Importers that * * * falsely reported its sales figures." C.A. App. 63-64. The court then read the indictment to the jury, including the "to wit" clauses in Counts 3 and 4. See *id.* at 83-84. The court next instructed the jury on the elements of bank fraud, the offense charged in Counts 2, 3 and 4. The court explained that a conviction requires proof beyond a reasonable doubt that the defendant devised a scheme or artifice to defraud a bank "by means of false or fraudulent pretenses, representations or promises that were material to the scheme." *Id.* at 86. It further explained that

> the false representations and pretenses must be "material." * * * A "material" fact is one which reasonably would be expected to be of concern to a reasonable and prudent person relying on the statement or writing in making a decision. That means that if you find a particular statement or writing to have been untruthful, before you can find that statement or omission to be material, you must also find that the statement or omission was one that would have mattered to a reasonable person who was making a decision on the matter.

Id. at 88. The court then reminded the jury that

> [t]he government has offered evidence that the government contends shows that the defendant engaged

> in fraudulent activities on occasions other than those charged in the indictment. Specifically, the government has offered evidence of exchanges of checks at times other than that alleged in the indictment and evidence concerning the defendant's tax matters.
>
> In connection with that, let me remind you that the defendant is not on trial for committing acts that are not alleged in the indictment. Accordingly, you may not consider any evidence of similar acts as a substitute for proof that the defendant committed the crimes charged.

C.A. App. 97-98. Finally, the court instructed the jury that "[t]he law only requires a substantial similarity between" the allegations in the indictment and the facts proved at trial. *Id.* at 99. Specifically, the court explained,

> if the indictment charges that certain monetary amounts were involved and the testimony or exhibits indicate that in fact different amounts were involved, it is sufficient if you find that the amounts involved are substantially similar to the amounts as alleged in the indictment.
>
> The same goes for most of the other factual contentions in the indictment—the law only requires substantial similarity between the indictment and the proof; that is sufficient. However, if you find that the difference between the allegations and the proof is material, then you must find the defendant not guilty.

Id. at 99-100.

During deliberations, the jury sent two notes to the court on Counts 3 and 4. The first note requested the text of the charges from the indictment. The second note asked whether the definition of an "attempt to defraud" "include[s] *other* information on the loan applications besides the sales figures, or is the charge based only on the sales figures?" C.A. App. 145. After conferring with counsel, the court, in response to the first question, provided the jury with the text of the charges for Counts 3 and 4. *Id.* at 141. In response to the second question, the government reiterated its view to the court that the "to wit" clauses were not "exclusive" and that the jury should be able to consider other false statements as well. *Id.* at 119. Petitioner argued otherwise and asserted that he had not received "any notice that [the government was] going to the jury on a different theory." *Id.* at 121. Petitioner stated that if the court were inclined to provide an answer other than "no," counsel would like additional time to research the matter. *Id.* at 125. The court agreed and deferred an answer to that question at that time. In the meantime, per petitioner's request, the court decided to resubmit the initial jury charge on bank fraud and ask the jury whether that information answered its questions. *Id.* at 133. If not, the court stated that the issue would be discussed further the next morning, as the court day was approaching an end. *Id.* at 132-133. The district court then resubmitted its initial charge on bank fraud. Before the jury retired for the day, and before the court could hear further argument from the parties' attorneys, the jury returned a verdict convicting petitioner on Counts 1, 2 and 4 and acquitting him on Count 3.

Petitioner was sentenced to 37 months of imprisonment, to be followed by three years of supervised re-

lease, and ordered to make restitution of $1.1 million. Believing that the probation office could not administer joint and several liability for amounts of restitution that differed among multiple defendants, the district court explicitly directed that petitioner's restitution obligation not be joint and several. Pet. App. A4.

4. On appeal, petitioner raised numerous claims of error. The court of appeals issued two separate opinions, one published and one unpublished, in which it affirmed petitioner's convictions but vacated the restitution order and remanded for resentencing. Pet. App. A2.

a. As relevant here, in the published opinion, Pet. App. A1-A7, the court of appeals concluded that the district court had erred in its belief that it could not impose joint and several liability for the restitution order. The court therefore "vacate[d] the restitution order and remand[ed] for further proceedings in accordance with this opinion." *Id.* at A7.

b. In the unpublished opinion, the court rejected petitioner's six remaining contentions, the first of which was that the jury instructions constructively amended the indictment by allowing the jury to convict petitioner if it found that any false statement in the loan application (such as the statement that he owed no back taxes) was material to the scheme, because the indictment's "to wit" clause limited the basis of the charge in Count 4 to one specific false statement (concerning the false sales figures). Pet. App. B3-B4. The court concluded that "details contained in a 'to wit' clause do not *per se* bar a trial court from instructing a jury that it may convict even if only related and unmentioned details were proven at trial." *Id.* at B4. Relying on *United States* v. *Rivera*, 415 F.3d 284, 287 (2d Cir. 2005), and *United States* v.

Danielson, 199 F.3d 666, 669 (2d Cir. 1999), the court explained "that deviation from the details described in the 'to wit' clauses" did not amount to a "fatal" constructive amendment of the indictment. Pet. App. B5.

"Nor," the court concluded, "was there any prejudicial variance." Pet. App. B5. Although the government did elicit an admission from petitioner that he had failed to report his tax liability on the loan application on cross-examination, the court emphasized that the government "devoted substantial time and testimony to [its] original theory that he falsified his sales figures on the application." *Ibid.* Under those circumstances, there was "simply no risk of [petitioner's] defense having been impaired by a lack of notice of what crimes were charged." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-9) that the jury instructions on Count 4 constructively amended the indictment by allowing the jury to convict petitioner "based on falsity completely different from the allegedly false sales figures" set forth in the "to wit" clause in Count 4 of the indictment. Pet. 7. Petitioner suggests that this Court's review is warranted to "remove the confusion" concerning the constructive amendment doctrine, as well as its relationship to the variance doctrine. Pet. 9. The court of appeals' conclusion that petitioner is not entitled to relief is correct, and further review is not warranted.

1. As a preliminary matter, the petition for a writ of certiorari should be denied because of its interlocutory posture. The court of appeals vacated the sentence insofar as it ordered restitution and remanded the case "for further proceedings." Pet. App. A7, B13. This Court typically awaits final judgment before exercising certio-

rari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); see also *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of a writ of certiorari). Lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). To avoid disruption of pending criminal cases, this Court ordinarily denies petitions for a writ of certiorari by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002) (Stern); see also *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (recognizing this Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"). That practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition for a writ of certiorari to the Court. See Stern § 4.18, at 258 n.59. Although the remand here was narrow, that fact neither deprives the judgment of its nonfinal nature nor prejudices petitioner's ability to file a subsequent petition from a final judgment. Cf. *Brotherhood of Locomotive Firemen*, 389 U.S. at 328.

2. In any event, petitioner's fact-bound claim does not merit this Court's review. Contrary to petitioner's contention, the record reflects that there was neither a constructive amendment of nor a variance from the indictment.

a. The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. This Court has repeatedly held that the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment. See, *e.g.*, *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 787 (2007); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). An indictment, however, need not allege all of the facts that the government intends to prove at trial; it is ordinarily sufficient for an indictment to provide factual detail only with regard to non-elements such as time and place. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 218 (1960); *Cochran & Sayre* v. *United States*, 157 U.S. 286, 290 (1895); *United States* v. *Britton*, 107 U.S. 655, 663 (1883). Nevertheless, an indictment may specify the particular facts that constitute an element of the offense. And if the government subsequently proves different facts at trial to establish that element, and the jury instructions permit a conviction on that different basis, a Grand Jury Clause violation may result.

While "proof at trial need not, indeed cannot, be a precise replica of the charges contained in the indictment * * * , [a] substantial deviation of instructions from an indictment is impermissible because first it requires a defendant to answer a criminal charge that was not brought by a grand jury, * * * and second it denies the defendant sufficient notice to prepare and present an adequate defense." *United States* v. *Lemire*, 720 F.2d 1327, 1344 (D.C. Cir. 1983) (internal quotation

marks and citations omitted), cert. denied, 467 U.S. 1226 (1984). Lower courts have treated factual differences between the government's evidence at trial and the factual theory specified in the indictment in two ways. Where "either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment," lower courts have characterized the divergence as a "constructive amendment" of the indictment, and have held that it constitutes structural error (thus requiring automatic reversal). *United States* v. *Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003) (internal quotation marks and citation omitted); see 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.6(c), at 809 & n.23 (2d ed. 1999) (LaFave) (citing cases). Where "the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment," lower courts have characterized it as a mere "variance" from the indictment. *Salmonese*, 352 F.3d at 621. A court will find a variance to be harmless error unless it "is likely to have caused surprise or otherwise been prejudicial to the defense." 4 LaFave § 19.6(c) at 809 & n.23 (citing cases).

b. The jury instructions and evidence presented in this case neither constructively amended the charge nor resulted in a prejudicial variance.

First, the jury instructions did not constructively amend the indictment. Contrary to petitioner's contention (Pet. 7) that the "jury was permitted to convict petitioner based on falsity completely different from the allegedly false sales figures charged in the indictment," the instructions did not invite conviction based on a

broader basis than was charged in the indictment. During its charge to the jury, the court read the entire text of the indictment, including the "to wit" clause in Counts 3 and 4. It also reminded the jury that "the defendant is not on trial for committing acts that are not alleged in the indictment. Accordingly, you may not consider any evidence of similar acts as a substitute for proof that the defendant committed the crimes charged." C.A. App. 98; *id.* at 100 (explaining that "the law only requires substantial similarity between the indictment and the proof; that is sufficient. However, if you find that the difference between the allegations and the proof is material, then you must find the defendant not guilty"). Taking the instructions as a whole, the jury would have understood that it was required to find the facts charged in the indictment (including the "to wit" clause), rather than materially different "facts not alleged in the indictment," in order to find petitioner guilty. Those instructions thus did not permit reliance on false statements in the loan applications pertaining to tax liability. Because the instructions were clear on that point, the district court's response to the jury's request for clarification by resubmitting the relevant instructions to the jury was appropriate. See *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000).

Moreover, the reality is that, in light of the instructions on the elements of the crime and the proof presented, the jury could not have rested its verdict on any basis other than the false sales figures included in the loan applications. See Gov't C.A. Br. 35-37. While the loan applications included a variety of information that the jury could have concluded was false, the jury was instructed that, to find petitioner guilty of bank fraud, it had to find a false statement that was *material* to the

bank. *Id.* at 36; C.A. App. 88. The only basis for finding that petitioner made a *material* false statement was testimony from a bank representative who stated that the only factors that the bank considered in approving a small business loan like petitioner's was the applicant's credit history and business sales. Gov't C.A. Br. 36. There was no evidence that would have supported a finding that any other false statement on the loan applications was material. In light of the virtually universal presumption that the jury follows its instructions, see, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 394 (1999), the record precludes the possibility that the jury might have found petitioner guilty based on any theory other than the one explicitly charged in the "to wit" clause of the indictment. Jurors are "well equipped to analyze the evidence" and reject an "inadequate theory" that was submitted to them under the instructions. *Griffin* v. *United States*, 502 U.S. 46, 59 (1991). And the jury here demonstrated that ability by acquitting petitioner on Count 3.[2]

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[2] Contrary to petitioner's contention (Pet. 6-7), this case thus differs from *Stirone*, 361 U.S. 212. In *Stirone*, an indictment charged the defendant with violating the Hobbs Act based on the theory that the defendant's extortionate conduct affected the interstate movement of sand. At trial, the government offered evidence that the defendant's conduct affected the interstate movement of both sand and steel, and the district court specifically instructed the jury that it could find the defendant guilty based on either theory. The jury returned a general verdict of guilty without indicating whether it had found that the defendant's conduct affected the interstate movement of sand or of steel. Explaining that it was impossible to "know whether the grand jury would have included in its indictment a charge" based on the steel theory, this Court held that the district court committed reversible error because the evidence presented and the district court's charge to the jury constructively amended the indictment such that the jury could have

In addition, as the court of appeals recognized, there was "simply no risk" that petitioner was "impaired by a lack of notice of what crimes were charged." Pet. App. B5. The government devoted "substantial time and testimony," *ibid.*, during its case in chief to establishing that petitioner defrauded Fleet by falsifying his sales figures on his loan application. In its summation, the government urged the jury to convict on Court 4 on the basis of the false sales figures. See 12/20/04 Tr. 1074-1078. It did not call the jury's attention to other false statements that petitioner made in the loan application, such as the statement that petitioner owed no back taxes. *Ibid.*

For similar reasons, petitioner suffered no prejudicial variance for the admission of evidence that differed from the allegations in the indictment. The core of the government's proof and argument was the false sales figures. The government's sole question on cross- examination about petitioner's tax returns—particularly in light of the substantial evidence adduced in support of the false sales figures he included on his loan application—is not sufficient to constitute a prejudicial variance.

c. As petitioner notes (Pet. 8), the Seventh Circuit has taken a different approach from the Second Circuit in interpreting "to wit" clauses, reasoning that "'[t]o wit' is an expression of limitation which * * * makes what follows an essential part of the charged offense."

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convicted the defendant on facts not actually charged in the indictment. *Id.* at 219. In the instant case, by contrast, the jury could not have found petitioner guilty on any basis other than the false sales figures that petitioner included in his loan applications as alleged in the indictment, because there was no evidence that any other false statements were material.

United States v. *Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994); see *United States* v. *Johnson*, 152 F.3d 618, 629 (1998) ("[W]ords of limitation in an indictment such as the words 'to wit' narrow the charge and correspondingly make the language that follows an essential element of the offense."); *United States* v. *Leichtnam*, 948 F.2d 370, 377-378 (1991). The Ninth Circuit, by contrast, has deemed the words following a "to wit" clause to be "surplusage." *United States* v. *Garcia-Paz*, 282 F.3d 1212, 1217, cert. denied, 537 U.S. 938 (2002).

This case, however, does not present a suitable vehicle for addressing the narrow disagreement over the import of a "to wit" clause or the significance, under the Fifth Amendment's Grand Jury Clause, of an evidentiary deviation from a "to wit" clause in an indictment. As discussed above, a rational jury following the instructions given would have convicted petitioner only on the grounds identified in the "to wit" clause. This case therefore does not squarely present the question of whether permitting convictions on some other related basis may impair the protections of the Grand Jury Clause.

Review is also unwarranted because even assuming, *arguendo*, that an error occurred, it should be found harmless whether that error is characterized as a "constructive amendment" or a "variance." To the extent that lower courts have held that a "constructive amendment" is not amenable to harmless-error analysis, see p. 13, *supra*, they have relied principally on this Court's decision in *Stirone*, which held that automatic reversal was warranted when the government proved an element at trial based on a factual theory that deviated from the factual theory advanced in the indictment. 361 U.S. at 217. *Stirone*, however, was decided before this Court's comprehensive adoption of constitutional harmless-error

analysis in *Chapman* v. *California*, 386 U.S. 18, 22 (1967). As Justice Stewart noted in his concurrence in that case, before *Chapman*, this Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42 (collecting cases). Because *Stirone* was decided in an era in which constitutional errors generally required per se reversal, that decision does not control the analysis in this case. In the wake of *Chapman* (and later cases subjecting analogous errors to harmless-error review), harmless-error analysis should be applied to any error resulting from a divergence between the facts specified in the indictment and the facts presented by the government at trial. Cf. *United States* v. *Cotton*, 535 U.S. 625 (2002); *Neder* v. *United States*, 527 U.S. 1 (1999).

Petitioner's entire petition for a writ of certiorari is devoted to the question of whether there was "error"; petitioner does not address whether any error that occurred would be amenable to harmless-error analysis in these circumstances. But, on this record, the single passing mention of petitioner's false statement concerning back taxes was harmless in view of the overwhelming evidence supporting the false sales figure theory and the government's overwhelming emphasis on that theory at trial. If the instructions did leave room for a conviction based on facts other than the allegations in the to wit clause, that room was narrow and not exploited by the prosecutors in this case. The same is true, *a fortiori*, with respect to any claim of variance. Under these circumstances, any claimed violation of the Grand Jury Clause would not have any effect on the disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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